No. 14,534

IN THE

United States Court of Appeals

For the Ninth Circuit

TONY BORDENELLI and EYVOHN BORDENELLI,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

JURISDICTION.

This is a proceeding brought by the United States of America against the appellants to have their liquor license revoked. The District Court issued an Order to Show Cause on May 26, 1954 (R. 23) and a hearing was held thereon on June 25, 1954 (R. 68). An order revoking the license was entered July 27, 1954 (R. 44). An appeal was taken on August 20, 1954, by filing with the District Court a Notice of Appeal (R. 46). The jurisdiction of the District Court rests on the Act of June 6, 1900, 31 Stat. 322, as amended, 48 U.S.C.A., Section 101, and 35-4-31 A.C.L.A., 1949;

the jurisdiction of this Court on Section 1291 of the Federal Judicial Code, 28 U.S.C.

STATEMENT OF FACTS.

The appellants filed an application, petition and census on March 13, 1953, for a Beverage Dispensary License to operate a liquor establishment at Kenai, Alaska, an unincorporated municipality. A hearing was held May 4, 1953, at which District Judge Dimond presided (R. 35). The District Judge who had presided at the original hearing, Judge Dimond, had since died and the second petition and census were filed June 20, 1953, pursuant to an order signed June 16, 1953, by District Judge Folta (R. 36). The order issuing the Beverage Dispensary License was not signed until July 21, 1953, shortly after Judge Cooper of the Second Division of Alaska arrived to sit temporarily in Anchorage (R. 36). The appellants commenced to operate a liquor establishment in a building approximately 950 feet from a church and 1500 feet from a school (R. 3, 59-60, 63, 65-66). With one exception, it was the liquor establishment the farthest in the community from the church and school (R. 63, 65). One bar was directly across the street from the appellants (R. 67). On October 13, 1953, the appellants were ordered to close their establishment pursuant to an order entered by District Judge Folta revoking the license (R. 37). The license was revoked, presumably, for one or more of the six reasons set out in the Order to Show Cause issued September

5, 1953. The order revoking the license was entered at Juneau (R. 15). It did not state the reason for revocation.

The appellants have never been convicted of any violation or infraction of the Territorial Liquor Laws (R. 67). On October 27, 1953, the appellants filed a motion to re-open the matter (R. 37). This motion was denied by District Judge Folta on December 4, 1954 (R. 37). The appellants on December 7, 1953, filed application for reissuance of their Beverage Dispensary License (R. 3). A hearing was held December 29, 1953 (R. 53). At the hearing it was claimed that the appellants' license should not be reissued for the reason their establishment was located less than a quarter of a mile from a schoolground, which was prohibited by Chapter 116, Session Laws of Alaska, 1953 (R. 54). The appellants argued that they came within the exception included in said statute, for the reason that they had been authorized by law to sell intoxicating liquor in the same building at a time subsequent to March 23, 1949, by virtue of the license issued to them July 21, 1953, which was revoked October 12, 1953 (R. 56-58). An order was entered December 31, 1953, granting appellants a Beverage Dispensary License (R. 7). Appellants again opened their establishment and proceeded to operate it.

On May 26, 1954, an Order to Show Cause why appellants' license should not be revoked was issued (R. 23). A hearing was had June 25, 1954, and argument by the United States Attorney and the attorney for the appellants was heard (R. 68). The argument

was essentially the same as that made at the December 29, 1953 hearing.

The Court wrote a Memorandum Opinion deciding that the license issued December 31, 1953, was issued in violation of Chapter 116, Session Laws of Alaska, 1953, and that the appellants did not come within the exception (R. 35). Order Revoking License was entered (R. 44). From this order this appeal is taken.

SPECIFICATION OF ERROR.

The District Court erred:

2. In holding that the license issued on the 21st day of July, 1953, was not subject to reissue and renewal.

ARGUMENT.

THE COURT ERRED IN HOLDING THAT THE LICENSE ISSUED ON THE 21ST DAY OF JULY, 1953, WAS NOT SUBJECT TO REISSUE AND RENEWAL.

SUMMARY.

The license issued December 31, 1953, was not in violation of Chapter 116, S.L.A., 1953, which increases the distance from schools and churches within which no new licenses may be issued. As the appellants' establishment is within a quarter of a mile of a church and school, it is clear that they were not entitled to the license issued to them December 31, 1953, unless they came within the exception to Chapter 116, S.L.A., 1953, set out in the Summary hereinafter referred to

as "The Exception". The license which the appellants had between July 21, 1953, and October 12, 1953, entitled them to reissue of their original license by virtue of the express provision of the following exception contained in the said statute:

> "* * * provided, however, that a license may be reissued for the sale of intoxicating liquor in any building in which such sale was authorized by law at a time subsequent to March 23, 1949."

OPINION BELOW.

The District Judge, in his Memorandum Opinion, stated:

> "The sole question to be determined by the Court in this matter is: Are the applicants entitled to a renewal of their liquor license for the year 1954, as contemplated by Section 35-4-15 of the 1949 Compiled Laws of the Territory of Alaska, as amended by Chapter 116, 1953 Session Laws, after the 1953 license was once issued and later revoked" (R. 38).

The appellants believe that this properly states the chief question below as well as the chief question involved in this appeal, with one exception. As both statutes referred to by the Court contain the word "reissue" rather than "renewal", the appellants submit that "reissue", the statutory term, be substituted for "renewal" in the statement of the question. This is a case of first impression.

MAIN ARGUMENT.

The appellants are unable to find reported decisions where the Exception has been applied or cases in other jurisdictions interpreting similar exceptions. This case will create new law in the jurisdiction.

EXCEPTION UNAMBIGUOUS.

The basic principle has been announced time after time, that if the statute is plain, certain and free from ambiguity, a bare reading suffices and interpretation is unnecessary.

Helvering v. St. Louis S. Ry. Co., 84 Fed. 2d 857;
U. S. v. Hartwell, 6 Wall. 395;
United States v. Wiltberger, 5 Wheat. 76;
Ruggles v. Ill., 108 U.S. 526;
Statutory Construction, Crawford, p. 244;
Lewis v. U. S., 92 U.S. 618;
Swarts v. Siegel, 117 Fed. 13;
Sturgis v. Crowin Shields, 4 Wheat. 122;
Southerland Statutory Construction, 3rd Edition, Vol. 2, p. 334.

The Exception is short, concise, and unambiguous. The appellants submit that conducting a liquor establishment under license of the District Court for a period in 1953 comes unquestionably within the wording of the Exception, and that the appeal should be decided without the necessity of going beyond the facts and the wording of the Exception. However, rather than rest here, the appellants will proceed to

examine the Exception to show that the facts definitely come within the express wording of the Exception.

"REISSUE".

In construing the term "renewal" the Court construed a word contained in neither 35-4-14 A.C.L.A., 1949, nor in the two amendatory acts, Chapter 83, S.L.A., 1949, and Chapter 116, S.L.A., 1953. All three statutes use the term "reissue". No lengthy discussion need be made here to show that the terms do not have the same meaning. Though the term, "renewal" may imply a necessity of continuity of licenses, the term, "reissue" rather suggests that for some reason the license has ceased to be valid and it is necessary to "reissue" it.

> "The prefix 're' denotes * * * 2. again—used chiefly to form words, esp. verbs, of action, denoting in general repetition (of the action of the verb) or restoration (to a previous state) * * *" *Websters New International Dictionary, 2nd Edition, Unabridged,* p. 2070.

As the appellants see no substantial question as to the meaning of the term "reissue", its meaning will not be discussed further.

"BUILDING".

The license was reissued for the same "building" where sale of liquor was licensed July 21, 1953. This has never been questioned.

"AUTHORIZED BY LAW".

The term, "authorized by law" in the Exception is clear and unambiguous. The appellants operated a liquor establishment from July 21, 1953, to October 12, 1953, under a license issued by the District Court, after a hearing. In a criminal prosecution for a violation of the liquor law, "without lawful authority so to do" was held to be the legal equivalent of "without first procuring a license". *State v. Monti.,* 90 Vt. 566, 99 Atl. 264. The fact that their authorization was terminated by an order revoking their license does not mean that they were at no time "authorized by law". For example, no one would contend that the appellants could have been criminally prosecuted for merely operating their establishment as long as the license was in force. One should give the term "authorized by law" its ordinary meaning rather than create the fiction that the appellants were never "authorized by law", merely because the license was revoked.

If the first license was properly issued and revocation improper, there can be no question but that appellants were "authorized by law" to sell liquor. The appellants have, at all times, asserted that the first license was properly issued and should never have been revoked. Though it was issued after Chapter 116, S.L.A., 1953, became effective, the appellants contend that having taken all the necessary steps prior to June 30, 1953, the date when Chapter 116, S.L.A., 1953, became effective, their rights under the statute in effect were preserved by the general saving clause statute, 19-1-1, A.C.L.A., 1949. This was urged by

appellants in their brief filed on December 31, 1953 (R. 18-19). There is no dispute that the first license was rightfully issued, if issued under the law in force prior to June 30, 1953.

Whether or not the revocation on October 12, 1953 was proper remains in question. The Order to Show Cause why the first license should not have been revoked stated six reasons why the license should be revoked. No hearing was ever held on the Order to Show Cause. A minute order revoking the license was entered at Juneau on October 12, 1953, by Judge Folta (R. 15). It did not give the reason for revocation. At the hearing held December 29, 1953, prior to the reissuance of the license, Judge McCarrey assumed that the principal reason for the revocation was the location of the appellants' establishment in relation to the school and church and under which law the license was granted (R. 54). However, the record does not show with any certainty why the first license was revoked, so it is impossible to decide whether the revocation was proper or improper.

Assume arguendo that the first license was wrongfully issued and was revoked for the reason that it did not comply with the law in force at the time of issuance and therefore never should have been issued. The determination remains not whether it would be wise policy to provide for reissue of the license under such circumstances, but rather whether the legislature has in fact done this.

PURPOSE OF LEGISLATURE.

Not only do the appellants come within the express wording of the Exception, but also their investment is of the type which the legislature sought to protect. The purpose of the legislature in creating the Exception is not difficult to ascertain from reading Chapter 116, S.L.A., 1953. The main purpose of this statute is to increase the distance from schools and churches within which new liquor establishments could not be licensed. The purpose of the Exception to this general provision is to protect the investments of persons "authorized by law, at a time subsequent to March 23, 1949," to sell intoxicating liquors in the same building. The policy to keep liquor establishments a certain distance from schools and churches is counterbalanced by the essential harshness of destroying the investments of those operating going establishments.

There is a further balancing in this case of the interest of the appellants' investment made in relying on the validity of the license and the interest in permitting the Court to correct what it considers to be its past errors. After a hearing, the Court has twice granted the appellants licenses; twice the appellants opened their establishment; twice the Court concluded it should not have issued the license and revoked them. It cannot be said that the harshness to which appellants were thereby subjected was not of the kind the legislature sought to alleviate, but it is a creation of the Exception. The wording of the Exception is broad enough to protect investments of this nature.

CONTRAST WITH AMENDED STATUTES.

In one respect the wording of the Exception differs from the comparable exceptions in the Acts which Chapter 116, S.L.A., 1953 amends, 34-4-15 (3) A.C.L.A., 1949, and Chapter 83, S.L.A., 1949. The Exceptions in the two earlier Acts apply to those authorized by law "at the time of the passing of this Act", while the Exception in Chapter 116, S.L.A., 1953, applies to those authorized by law "at a time subsequent to March 23, 1949". The Legislature had the earlier statutes before it when Chapter 116, S.L.A., 1953, was drafted and when it was determined to change the wording, the Exception makes no requirement that the authorization be continuous. Instead it provides, "at *a* time subsequent to March 23, 1949" (emphasis added). In including within its wording the authorization subsequent to the time of passing the Act it takes in the appellants whose first license was issued July 29, 1953, though Chapter 116, S.L.A., 1953, became effective June 30, 1953. The Exception requires that the authorization be on no particular date, but merely need be some time after March 23, 1949.

LIMITED BY LAST PARAGRAPH OF STATUTE.

The breadth of the Exception is, however, cut down by the last paragraph of Chapter 116, S.L.A., 1953. It provides no license shall be issued after being forfeited by reason of a violation of law. The record indicates that the appellants have never been convicted

of any violation of the Territorial Liquor Laws (R. 67). The last paragraph is also of assistance in giving content to the Exception which immediately precedes. The logical implication of the last paragraph when read together with the Exception which immediately precedes it is that a license may be reissued if revoked for reasons other than violation of law. The use of the maxim *expressio unius est exclusio alterius* produces the same result. The result is that the last paragraph sets up the only fact situation coming within the broad terms of the Exception, under which a person would not be entitled to reissue of the license.

At the very least, the last paragraph of Chapter 116, S.L.A., 1953, implies that there are some circumstances under which a license revoked for reasons other than "violation of law" could be reissued. The facts here involved present as strong a case for reissue of a revoked license as could be conceived. Most of the difficulties stem from the untimely death of Judge Dimond who first heard the case and the fact that no less than four different judges acted in the case. The new law, Chapter 116, S.L.A., 1953, became effective before another judge could act on the appellants' application. Then came the revocation of the license with no hearing held and no indication of the reason for the revocation, after the appellants had been operating their establishment for several months. After obtaining a second license, following a hearing in which the application of the Exception was argued, appellants again, in good faith, proceeded to operate their establishment when again the license was re-

voked. If, as the last Exception in Chapter 116, S.L.A., 1953, implies, there are situations when a revoked license may be reissued, this must be among them.

CONCLUSION.

For the reasons stated, it is submitted that the order revoking the appellants' second license should be reversed.

Dated, Anchorage, Alaska,
May 16, 1955.

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T. STANTON WILSON,
Attorneys for Appellants.